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WISCONSIN OPEN MEETINGS LAW

As your Municipal Attorney, I believe it is my obligation to advise you of your duties regarding Wisconsin's Open Meeting Law. Over the years my office has had extensive experience with this law. Our experience, regrettably, includes defense of municipalities and elected officials who have been accused of violating the law. We prefer to avoid those accusations, if it is possible to do so. Therefore, we regularly try to educate relevant personnel of the requirements of the law. With this objective in mind, I have prepared the following Memorandum. I hope that this will assist you in complying with Wisconsin's Open Meeting Law, in order to prevent inadvertent violations of the law, and to preserve good government. As always, I am available to describe these obligations in further detail, or to answer any specific questions you may have, on your request.

M E M O R A N D U M

The Wisconsin Open Meetings Law is found in Sections 19.81 through 19.98 of Wisconsin Statutes. In this memorandum I will discuss seven aspects of the law: (1) The general purpose of the law; (2) *Who* is subject to the law; (3) *What* is subject to the law; (4) Special rules for closed session; (5) Avoiding violations related to public comments; (6) Notice requirements; and (7) Penalties that apply for violations.

(1) The general purpose of the law.

The purpose of the law, in general, is to ensure citizens full and complete access to the affairs of government:

> "In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that *the public is entitled to the fullest and most complete information regarding the affairs of government* as is compatible with the conduct of government business." (Section 19.81(1), Stats.)

This statement of purpose is very important, as courts refer to it often. The provisions of the Open Meetings Law are required to be interpreted broadly to accomplish this purpose. (Section 19.81(4), Stats.) In furtherance of this purpose, the state legislature requires that all meetings of governmental bodies be open to the public:

> "To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law." (Section 19.81(2), Stats.)

As a general rule, you ought to presume in every case that the public is entitled to receive full and complete information (including prior notice, and ability to attend) anytime a governing body engages in government business, unless a specific exception applies. I will define particular applications of this general rule in the remaining sections of this Memorandum.

(2) Who *is subject to the law.*

The law applies to all "governing bodies". This term is specifically defined in the law, and it is defined very broadly to include much more than only the primary governing body:

> "Governing Body" means any local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinances, rule or order... or a formally constituted subunit of any of the foregoing ... (Section 19.82(1), Stats.)

It also applies to any committees, park commissions, zoning boards of appeals, boards of review, and planning commissions, and you may have other committees or boards that may be subject to the law. If you have a question regarding a particular entity is a "Governing Body" that is subject to the law, please advise and I will attempt to answer that question for you. Generally, I advise municipal officers, if they appoint advisory committees such as a building committee or salary review committee, these committees are subject to the law also because they are created by order of the Chief Presiding Officer and/or Governing Body.

(3) What *is subject to the law.*

The law applies to "meetings" of governing bodies. This also is a term that is defined in the law, and is defined very broadly. This term includes the kind of activity that you normally think of as meetings, such as your regular meetings, but it also can include much more, as I will discuss below. The definition is:

> "Meeting" means the convening of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of the governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this Subchapter ... (Section 19.82(2), Stats.)

Wisconsin courts have interpreted this definition as having two components, one related to purpose, and the second related to number. First the *purpose* of the gathering must be to engage in government business, be it discussion, decision or information gathering. Second, a sufficient *number* of members of the body must be present to determine the outcome of the matter in consideration. (*Newspapers Inc. v. Showers*, 135 Wis.2d 77 (1987).) If the purpose and number requirements are met, it is a meeting that is subject to the open meetings law.

Before I analyze this further, note first that this definition contains a presumption that any time one-half or more of the members of a governmental body are present, they are presumed to be meeting for the purpose of exercising their governmental duties. This means that, if the governing body's activity were challenged, the person making the challenge only needs to allege that more than half of the governing body is present; upon that allegation (assuming one half or more were actually there) the governing body would have to try to prove to the court that it was not exercising the responsibilities, authority, power or duties of the office, at all, at the time. This is often a difficult burden to meet.

Moreover, the case law and Attorney General opinions that have interpreted the law result in even more stringent requirements for you to follow. I will discuss three such matters, regarding a "negative quorum", "walking quorum" and the applicability of these rules to telephone and e-mail conversations.

(a) <u>Negative quorum.</u>

In many situations, the number of members who may control the outcome of particular issues may be less than a quorum of the governing body. For example, some issues require a two-thirds vote to pass. If two thirds vote of a seven member body is required, then 5 votes are needed to pass. In that situation, three votes against would control the outcome (i.e. a "negative quorum"). Therefore, on issues that are subject to a two-thirds vote, a gathering of three members is subject to the open meetings law, if it is for the purpose of discussion, decision or information gathering related to that issue.

Likewise, as to matters that are subject to a three-fourths vote of the governing body, two members of a seven member governing body can control the outcome, because six votes are needed to pass. On those issues, communication between two members is subject to the open meetings law, if it is for the purpose of discussion, decision or information gathering related to that issue.

Some governing bodies, and numerous committees, have fewer than seven members, so the above-described analysis will need to be modified in accordance with the number of members on the Board or committee. For example, if there are only six members, then three votes against any motion would prevent passage of the motion, regardless of whether a simple majority or two-thirds vote is required. Because three votes would control the outcome, a gathering of three

members would be subject to the open meetings law, if it is for the purpose of discussion, decision or information gathering related to that issue.

To complicate matters even further, in some situations, often less than the full membership of the governing body will make the final decision, as some members may be absent or may recuse themselves. This affects the numbers that apply to the negative quorum. For example, suppose a governing body consists of seven members, but one of the seven member board will not be taking part in the decision. In that situation, three members of the six who can vote on the issue can control the outcome, even if only a simple majority is required to pass. A gathering of three members is then subject to the open meetings law, if it is for the purpose of discussion, decision or information gathering related to that issue. To take this point even further, as few as four members may make the ultimate decision, because it is possible that the bare minimum will take part in any given issue, which is four of the seven member board (assuming four is a quorum, which is usually the case with a seven member board). This means that as few as two members can in fact be a controlling number of votes.

This leads to a complicated and somewhat unpredictable analysis that must be made in every case to determine whether the open meetings law applies in particular situations. As a practical matter, if you are unsure of the number of votes that may control the outcome in a particular situation, obviously the prudent course of action is to avoid discussing governmental business outside of a properly noticed meeting, even with only one other member of the governing body.

(b) Walking quorum.

It is possible that the law may also be violated by a series of gatherings, each one of which includes fewer than a controlling number of members. For example, if three persons can control the outcome of the matter, you may violate the law if you are a member of a governing body and you discuss the issue with one member, and then later discuss the issue with a third member. That series of discussions could constitute a "meeting" of three members, even though not all three were present at the same time. (*Showers*, 135 Wis.2d at 100.) The courts refer to this as a "walking quorum", and subject it to the same notice requirements that apply to other meetings of governing bodies, to ensure that the purpose of the open meetings law is not violated.

(c) Telephone.

The attorney general has given an opinion that even a telephone call that is made for the purpose of engaging in government business can be a meeting, if a controlling number of members participate in the call. The attorney general has also concluded that a series of telephone calls can result in a "walking quorum", which constitutes a meeting that is subject to open meetings law requirements. Telephone calls, therefore, are indistinguishable from face-to-face conversations.

(d) E-mail.

In recent years, the technological changes that have brought e-mail into our daily lives have resulted in new concerns about whether the use of e-mail constitutes a meeting, for purposes of the Wisconsin Open Meetings Laws. This technology was certainly not contemplated when the laws were created, and therefore it is difficult to apply these laws in this context. At the same time, there has been a consensus growing on this issue over recent years among practitioners of municipal law, guided in part by the Wisconsin Attorney General's Office, and I will turn to that emerging interpretation next. (Note that for convenience I will use the word "quorum" in the following analysis, but I mean for that to also include a "negative quorum" and a "walking quorum," as discussed above.)

Analysis of E-mail Issue. Two bodies of law come together in this e-mail issue. One is the Wisconsin Public Records Law, and the other is the Wisconsin Open Meetings Law. As to the first of these issues, keep in mind that e-mail messages relating in anyway to governmental business are all public records. You are obligated to maintain those public records when you receive them for a period of seven years unless local ordinances have been created to establish a different retention period. You should never delete an e-mail message that relates to governmental business, therefore, unless you are sure that the retention period has lapsed.

The *open meetings* issue arises when e-mail is used more like a conversation than it is used like a letter. Frequently these conversations on e-mail will go back and forth and essentially are indistinguishable from a conversation. If such a communication involves a quorum of the governmental body, it is likely a violation of the law.

I find the Attorney General's description of these open meetings issues to be particularly persuasive, and I believe this analysis is likely to be followed by a court. In the "Wisconsin Open Meetings Law Compliance Guide, 2003" published by the Wisconsin Department of Justice, Office of the Attorney General, the Attorney General gives the following guidance on this issue:

> The widespread use of electronic mail and other electronic message technologies creates special dangers for governmental officials trying to comply with the open meetings law. Although two members of a governmental body larger than four members may discuss the body's business without violating the open meetings law, features like "forward" and "reply to all" common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. Moreover, because of the electronic mail communication, it is quite possible that a quorum of a

> governmental body may receive the sender's message -- and therefore may receive information on a subject within the body's jurisdiction -- in an almost real-time basis, the way that they would receive it in a meeting of the body. Because of the dangers posed by electronic mail, the Attorney General strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body's realm of authority.

E-mail to a Quorum of the Governmental Body. I suggest, therefore, that e-mail message should not be sent back and forth among a quorum of the governmental body. The same can be said regarding copying e-mail messages to a quorum of a governing body, and forwarding e-mail messages to a quorum of a governing body.

The key issue is not whether a quorum of members have actually participated in the discussion by saying something, the issue is whether a quorum of the members have been privy to the discussion as it is taking place. If it appears to be an ongoing discourse between only two individuals, but the messages are copied to the full governing body, this can certainly have the appearance of a conversation that involves the full board. Consider this: What is the purpose of copying the other members if it is not to involve the other members in the conversation? If the purpose in fact is to involve the other members in the conversation, this should be done only at a properly noticed meeting.

Easy Target. As a practical matter you need to be aware that you can easily become a target and could be exposed for violating these laws by media companies which closely watch these issues. Email leaves a trail that is easy to follow. Numerous articles have appeared in the Milwaukee Journal Sentinel from time to time, which show how use of e-mail could come back to haunt you. I hope that you never have to face the scrutiny and ridicule that can arise in that regard.

Practical Suggestions for E-mail. I realize that the foregoing analysis leaves you with some rather vague rules of law. Unfortunately, that is the state of the law as it exists today. My recommendations to you are as follows:

- One-way Communication. I recommend that e-mail be used, if it is used, for one-way communication only. If you receive a one-way communication that was delivered to a quorum of the governmental body, do not "reply all" to it, and do not forward it to other governmental body members. If you have thoughts you would like to express regarding the matter, I recommend that you follow your procedures for placing that issue on an upcoming meeting agenda.

- Keep Private conversations private. From time to time you may engage in e-mail conversations back and forth with municipal staff, or a single member of the governing body. In those circumstances, you should not expand that conversation to include other members of the governing body.

- Disclaimer. When you send an email in your official capacity, I recommend that you add a disclaimer to the end which prohibits further distribution of the e-mail message. While that disclaimer might not necessarily prevent a recipient from forwarding it, if ultimately an open meetings violation occurs as a result of your email, the disclaimer may shield you from liability for having sent it initially. The disclaimer that I recommend could read substantially as follows:

  This message originates from_____ . It contains information that may be confidential or privileged and is intended only for the individual named above. It is prohibited for anyone to disclose, copy, distribute or use the contents of this message without permission, except as allowed by the Wisconsin Public Records Laws. If this message is sent to a quorum of a governmental body, my intent is the same as though it were sent by regular mail and further distribution is prohibited. All personal messages express views solely of the sender, which are not attributed to the municipality I represent, and may not be copied or distributed without this disclaimer. If you receive this message in error, please notify me immediately. You could go even further than this, for that matter.

One of our clients routinely provides the following disclaimer, which I offer to you as a second example for your consideration:

Open Meetings Disclaimer: The email below contains the thoughts, opinions, and commentary of the author alone. It is intended as a one-way transmission of a thought, idea, or information related to my role as municipal official or issues within the municipality, but is not intended to serve as an invitation for reply, rebuttal, discussion, debate or responsive commentary. Please do not respond to this

email as it is the author's intention to utilize the informality and convenience of this electronic message while simultaneously avoiding any and all violations of the Wisconsin Open Meetings Law contained in Section 19.81 of the Wisconsin Statutes or elsewhere within Wisconsin law, as applicable to this municipality as described in 66 Op. Att'y Gen. 237 (1977). Specifically, there is no intention on the part of the author to engage in or foster any "governmental business" as defined in State ex.rel. Newspapers v. Showers, 398 N.W.2d 154 (Wis. 1987). You are specifically requested to refrain from forwarding or "replying to all" with regard to its contents, so as to avoid the possible "walking quorom" proscriptions, including those considered in State ex.rel. Lynch v. Conta, 239 N.W.2d 313 (Wis. 1976). It is the author's motive and intent to comply with the overriding policy of the open meetings law - to ensure public access to information about governmental affairs. Your cooperation in accomplishing this end is most appreciated.

- Retention Policy. If you do not have a clearly established retention policy for e-mail messages, I recommend that you consider establishing one. This policy would apply to computers within the municipality, and also for any computer that you use for receipt or mailing e-mail communications relating to your official capacity. At a minimum, I suggest that all e-mail communications that you send or receive should be copied to the municipal Clerk so that the Clerk can maintain the record. If you have a particular reason why the message should not be sent to the municipal Clerk, keep in mind that you then have a larger responsibility for that record given that it will not be maintained by the Clerk. Please keep in mind that in general most public records are required to be retained for seven years, though there are exceptions, and there is a very intricate procedure to change record retention periods. You should contact us if you want to explore reduction of applicable records retention requirements.

- Use Discretion. One important difference between e-mail and an in-person discussion is that e-mail messages leave a trail which is open and available to the public. You need to keep this in mind at

> all times if you intend to use e-mail. The statement you may make over the telephone may not have any forethought and may be forgotten forever, but an e-mail message made without forethought can be located later, printed in the newspaper, used against you in litigation, and etc. Always keep in mind that your e-mailed messages might be broadcast to the world.

(4) Special rules for closed Session

As you know, you occasionally will have a lawful reason to meet in closed session. Closed session, however, is an exception to the general rule, which generally requires that meetings be in open session. Consider, first, therefore, what is meant by "open session":

> "'Open Session' means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times. ..." (Section 19.82(3), Stats.)

The phrase "open to all citizens at all times" is an unambiguous general prohibition against holding closed, or secret meetings. However, this does not necessarily require that meetings be held at the Municipal Hall. The attorney general has stated that governmental bodies may meet in private buildings, even private homes, if the location is reasonably accessible and properly noticed. However, if a private building, such as the clerk's home is used, the public must be allowed to enter the home to observe the meeting.

Occasionally, you will face sensitive issues that you would like to discuss privately, without members of the public being present. Even so, you still must meet in open session unless there is an applicable statutory exemption which allows you to go into closed session. Section 19.85 of the Wisconsin Statutes describes all such lawful exemptions. One exemption, for example, is for conferring with legal counsel who will advise the governing body regarding strategy to be adopted regarding current or likely litigation, namely section 19.85(1)(g). Obviously, in that situation, the municipality would have an unfair disadvantage in the litigation if the opposing party could sit in and observe the municipality's legal strategies, and therefore the legislature created this statutory exemption to the open meetings law.

The statute contains several other specific exemptions, which arise out of similar concerns that the municipality's interests cannot reasonably be discussed or pursued in open session. Rather than attempt to summarize all of the lawful reasons for going into closed session, I merely wish to point out that there are only a few specific lawful reasons for going into closed session, which are all contained in section 19.85, Wisconsin Statutes. Whether closed session is appropriate must be considered on a case-by-case basis, often in consultation with counsel if you

have questions regarding particular situations. Any doubts about whether a closed session is permitted must be resolved in favor of requiring an open session.

If you have a lawful basis for holding a closed session, the next issue is the several technical procedural requirements that apply. The governing body must first convene in open session. Thereafter, a motion may be made to go into closed session, which must then be seconded. Prior to voting on the motion, the presiding officer must publicly announce the nature of the business to be considered in closed session, and the particular statutory exemption which authorizes the closed session meeting, which must be recorded and reflected in the minutes. The motion must then be approved by a majority roll call vote, and the vote of each member must be recorded and reflected in the minutes.

The governing body may then exclude all members of the public from closed session. This includes the governing body's right to exclude the clerk, treasurer, assessor, municipal employees, etc., because they are not members of the governing body. However, if the governing body is a sub-unit of a parent governing body (e.g. a sub-committee of the governing body), then members of the parent body shall not be excluded from the meeting, unless the rules of the parent body provide otherwise. §19.89, Stats. I also do not encourage the governing body to exclude the clerk because minutes of formal actions taken in closed sessions should be recorded. If the governing body feels compelled to exclude the clerk for whatever reason, one of the governing body's members should be designated to take minutes of the meeting. The closed session need not be tape recorded nor must every word said be recorded in the minutes. Formal actions in closed session should be recorded.

You need to be careful that the people who are invited into closed session do not defeat your lawful basis for the closed session. For example, if you intend to go into closed session for competitive or bargaining reasons (19.85(1)(e)) you should not have the party you are negotiating with in the closed session. The intent is to prevent the party you are negotiating with from knowing your negotiation strategy. You cannot keep the matter secret from others if you let the ones hear it which the law protects you against.

During the closed session meeting, the only issue that may be considered is the specific issue that was announced by the chief presiding officer prior to going into closed session. When consideration of that matter is complete, the governing body then has two options, depending upon the contents of the meeting notice. If the notice of the meeting advised that the governing body may reconvene in open session, then the governing body may do so and proceed in open session to consider such matters as were properly noticed. On the other hand, if the meeting notice did not give notice that the governing body would reconvene in open session, then the governing body is prohibited from doing so, and they must adjourn.

Formal voting in closed session is generally discouraged, although occasionally it may be necessary to do so. In one reported case, the Court of Appeals commented that formal votes must be made in open session. *Shaeve v. Van Lare*, 125 Wis.2d 40 (Ct. App. 1985). Since that time, however, commentators including counsel for the Wisconsin League of Municipalities, have concluded that the Court of Appeals' comment in this regard was not a necessary part of the decision, and is probably not a requirement that need be followed in every case. I believe that there are times when a vote must be taken in closed session, rather than open session, because of confidentiality or competitive reasons that are an integral part of the closed session deliberation, and in those circumstances I recommend that you vote in closed session. Also, obviously, if you are prohibited from re-convening into open session, due to failure to notice that fact, then the vote to adjourn must be in closed session.

The minutes of the closed session, and the tape of the closed session if one was made, are public records, but access to these public record should be carefully considered by the records custodian. As with all public records, when a request for a record is received, the records custodian must perform a balancing test prior to releasing the record. If the reasons which justified going into closed session are still applicable, e.g. legal counsel discussed strategy regarding litigation in closed session and the litigation is continuing at the time of a public records request, then the reasons for preventing access will probably outweigh the public's interest in the record, and the custodian will not disclose the record. Once the litigation is over, however, the public's interest in the record may outweigh the reasons to prevent disclosure, and in that event the record must be released.

You should not expect that statements made in closed session are completely private, or that nobody will ever know what was said in closed session. Our courts have allowed litigants to pursue discovery against municipalities, in some limited situations, to find out what was said in closed session, e.g. in the case of *Sands v. Whitnall School District, 754 N.W.2d 439 (2008).* The court held "we conclude that Section 19.85 does not create a privilege shielding contents of closed meetings from discovery requests." This does not mean that all closed session information must be released whenever it is requested, or that it must be released during litigation. There is ample existing case law unaffected by this case, which often times would prevent the statements made in closed session from being disclosed, depending upon the circumstances existing at the time that the request is made. Even so, it is important to remember that you are conducting governmental business in closed session and you should conduct yourself appropriately in that regard, including exercising your best judgment and maintaining proper decorum. If you do so, there is really no cause for concern if at some time in the future, when there is no longer a need for confidentiality, the statements that were made in closed session might reach the light of day.

5) Avoiding violations related to public comments

The open meetings laws specifically allow a governing body to receive public comments at meetings. The law states, in relevant part:

> "The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public." (Section 19.84(2), Stats.)

Also, the governing body may discuss the public comments:

> "During a period of public comment under s. 19.84(2), a governmental body may discuss any matter raised by the public." (Section 19.83(2), Stats.)

Therefore, if proper notice is given, the governing body may "receive information from members of the public" and "discuss any matter raised by the public".

Several issues arise regarding this law, which I want to briefly address. First, keep the notice requirement in mind. You should not allow members of the public to speak at a meeting regarding matters that are not specifically included in the meeting notice, unless the meeting notice describes a period of public comment.

Second, you must not take action on any matters that arise during this public comment period. The law only allows you to "receive information" and "discuss" those matters, it does not allow you to take action.

Third, in my opinion, which counsel for the League of Municipalities shares, members of the governing body may not make public comments during the public comment period. By this I mean, the governing body members cannot use this public comment period as a means to bring up for discussion issues that were omitted from the meeting notice. That practice would clearly violate the intent of the open meetings law, which is to provide the public with full and complete access to the affairs of government, and also would violate the requirement that notice of the subject of a meeting be provided in advance of the meeting. Instead, all public comments during this portion of the meeting must be initiated by persons who are not members of the governing body. If the members of the governing body have issues that they would like to discuss at the meeting, they should be sure that those matters are specifically included in the agenda ahead of time, so that appropriate notice of those matters can be given.

(6) Notice requirements

One of the key components of the open meetings laws is the notice that you are required to give prior to any meeting. I will discuss three aspects of the public notice requirements, namely: (a) *How* must the notice be given; (b) *When* must the notice be given; and (c) *What* should the notice contain?

(a) *How* must the notice be given?

There are two general requirements regarding public notice. First, the open records law requires that other applicable statutory notice requirements must be met. For example, Board of Review has its own notice requirements, as stated in §70.47, and the open meetings law requires that statutory notice to be given prior to any meeting of the Board of Review. While this results in several different notice requirements being required depending upon the particular issue involved, that complexity is not due to the open meetings law itself, but is due to the particular notice requirements of other statutes. Therefore I will not discuss this first general requirement further in this context. The more complicated notice requirement that is directly related to the open meetings law, is this: each meeting must be preceded by a communication from the chief presiding officer or his or her designee to all of the following: (a) the public; (b) to those news media who have filed a written request for such notice; and (c) to the official newspaper (if one is designated) or if none exists to a news medium likely to give notice in the area. I will discuss these three communications from the chief presiding officer further, in turn.

First, the chief presiding officer or designee must communicate notice to *the public*. This may be done by posting the notice in one, or preferably several places in the municipality where it is likely to be seen by the public, or it can be done by publication. The Attorney General has suggested that it is prudent to post the meeting notice in three separate places in the municipality, and that would be my recommendation as well. Some municipalities use publication in a newspaper but this is not required if notice is posted. One of the problems with using publication exclusively is that if a weekly newspaper is used, often the deadline is early in the week. If a matter requires a meeting on 24 hours notice, the newspaper is not published until a week later. Also, if the newspaper fails to publish the notice for some reason, the meeting cannot be held. On the other hand, the three postings can be made completely within the control of the municipal officers.

If you provide notice to the public by posting, you need to consider what locations in the municipality are likely to give adequate notice. The Municipal Hall door is, of course, one of the most common locations. You could also post in other public places such as a municipal park or fire station, where you believe the notices are likely to be seen by the public. Posting at private businesses is also proper, including taverns. However, we would encourage the municipality to place a bulletin board outside of any such private business (especially at taverns) with the owner's permission, to avoid any improper appearance. The key to the use of three locations is to

establish the locations, let the public know where they are, and use the same ones consistently so the information can be communicated to the public.

The chief presiding officer, secondly, must communicate the notice to the *news media who have filed a written request.* As you know, many news media have a standing request to receive all meeting notices of certain governing bodies. You are required to give notice to those news media. As with the other notices you are required to give, I recommend that you provide this notice in writing.

Finally, the chief presiding officer is also required to communicate the notice to the official newspaper, or if there is none, to a news medium likely to give notice in the area. This section warrants more discussion. First, some municipalities are not required to designate an official newspaper, although they may do so by formal action of the governing body. Many municipalities have determined what newspaper or newspapers are likely to give notice in the area, and use that newspaper or newspapers when they publish notice, but have not taken the formal action to designate an official newspaper. This is perfectly okay under the law. However, even if the governing body has not designated an official newspaper, the municipality still must give the notice to a news medium likely to give notice in the area. This notice is for the news media's information and is available for them to publish or broadcast if they choose to do so. This phrase in the statute does not require a paid publication.

Some municipalities have special general publication requirements, because a newspaper is published in the municipality. Special publication rules may apply to a municipality if a newspaper is published in the municipality, per Section 61.32 and 61.50, Stats. In that event, however, the newspaper that is published in the municipality is not the same as the "official newspaper", unless the designation has been made by the governing body. Therefore, the notice requirements described above are the same for all municipalities, regardless of whether a newspaper is published in the municipality.

(b) *When* must the notice be given?

The timing of the notice is critical. Section 19.84(3), Wisconsin Statutes requires that the public notice must be given at least 24 hours prior to commencement of such meeting with one exception. The exception applies when it is impossible or impractical to provide 24 hours notice, in which case shorter notice may be given, but in no case less than two hours in advance of the meeting. The emergency provisions of less than 24 hours should be used only in the most extreme of situations.

Keep in mind that the 24 hour time period is measured from the time the notice is communicated to the relevant party. So, for example, it is not enough to drop the notice in the

mail 24 hours prior to the meeting; instead, it must be received by the relevant person 24 hours prior to the meeting. The notice can be communicated by fax, however, and when you are faced with a short time for the notice, fax is a recommended method.

Finally, do not try to combine separate meetings into one notice. Each meeting must be preceded by a separate notice.

(c) *What* should the notice contain?

Every public notice must set forth the time, date, place and subject matter of the meeting, including the subject of any contemplated closed session, in such form as is reasonably likely to apprise members of the public and news media of the subject of the meeting. The time, date, and place are obvious in any meeting notice. However, I must encourage all municipalities to be more careful to detail the subject matter of their meeting. Each item must be stated. It is not enough to say "committee reports" or "highway report" in many cases. The Attorney General has also cautioned against including agenda itmes like "Staff comments" or "Chair's Comments" on the agenda, because specific notice should be given of the subject of such comments. Especially if the municipality is going to receive a report from a committee on a particular subject and take action, it should be spelled out. For example, a park committee recommendation to purchase a piece of equipment such as a truck, should state "consideration and action on purchase of truck for park purposes". On subjects relating to highway projects, the specific nature of the project should be spelled out such as "discussion and action on seal-coating Jones Road". Even when no action is to be taken, but information is gathered, or discussion is held, notice should be provided so that all interested persons can choose to attend.

If any item is anticipated to be considered in closed session the notice should state that the governing body may go into closed session. For example, the notice should say that the governing body may go into closed session to receive advice from counsel regarding strategy to be taken in pending litigation related to the Jones Road seal-coating project, pursuant to Section 19.85(1)(g). If the governing body intends to return into open session after the closed session, the notice must so indicate, and should also indicate the subjects of the ensuing open session.

(7) Penalties that apply for violations.

Any member of the governmental body who knowingly attends a meeting held in violation of this law could be ordered by a court to forfeit not less than $25 no more than $300 for each violation. This is not reimbursable from the municipal treasury. You are deemed to know that a violation is taking place if you act "with an awareness of the high probability" that a violation is occurring.

In addition to the personal monetary penalty, any action taken at any improperly noticed meeting may be voided by a circuit court judge. Moreover, the attorney general or the district attorney may also bring actions for injunction, mandamus and/or declaratory relief against the governing body, or members thereof.

You may have a limited ability to protect yourself, if you are concerned about whether a violation will occur in a particular situation. In some circumstances, if you vote in favor of a motion to prevent the violation from occurring, you may be exempt from liability, even though a violation later occurs. Also, if you are prosecuted for a violation, and you successfully defend against that prosecution, you may seek reimbursement for costs incurred in the defense (which the governing body may, or may not, grant).

Probably the worst effect of an open meetings law violation, though, is the public embarrassment and criticism that come with such charges of violations of the law. These charges often make the newspaper and media and become campaign issues. As with the direct penalties that may be imposed, we certainly want to avoid these less tangible consequences.

Conclusion.

I hope that this Memorandum will be useful to you as an overview of this important area of law, and also as a document that you can refer to in the future when particular issues arise. After you have had an opportunity to review this Memorandum, if you have any questions or concerns, please do not hesitate to contact me. Even more importantly, when particular issues arise in the future that cause you to question or be concerned about the applicability of the open meetings law, I urge you to contact me immediately to ensure that violations do not occur.

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